

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

December 3, 2008 Session

IN THE MATTER OF RYAN B. & STEVEN B.

Appeal from the Juvenile Court for Monroe County

No. J-08-071 J. Reed Dixon, Judge

No. E2008-01257-COA-R3-PT - FILED JANUARY 29, 2009

The trial court terminated the parental rights of Tammy B. (“the mother”) and Steve B. (“the father”) to their minor child, Ryan B., based upon persistence of conditions that led to the removal of the child from the parents’ custody by the Department of Children’s Services, and upon a finding that termination of the parental rights was in the best interest of the minor child. The trial court declined to terminate the parents’ rights to the minor child, Steven B., finding that termination was not in the best interest of the child. The parents and DCS appeal. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed: Case Remanded**

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and CHARLES D. SUSANO, JR., J., joined.

Clifford E. Wilson, Madisonville, Tennessee, for the appellants, Tammy B. and Steven B.

Robert E. Cooper, Jr., Attorney General and Reporter, and Douglas Earl Dimond, Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children’s Services.

**OPINION
Background**

This is a termination of parental rights case which culminated in the trial court’s Order of March 10, 2008, terminating the parental rights of the mother and father to the minor child Ryan B. (“Ryan”), age 11, based upon the persistence of conditions since the child’s removal by the Department of Children’s Services (“DCS”) for a second time in August 2004. Finding that termination was not in the best interest of the child, the trial court declined to terminate their parental rights to the minor child Steven B. (“Steven”), age 13, who was also removed from the parents’

custody in the August 2004 Order, as were two teenage daughters¹.

All four of the children were first removed from the parents' care in 2001, due to reports that the children were infected with lice. After these problems were resolved, the children were returned to the home. DCS next became involved with the family in August 2004. At that time, the father had been arrested for drug possession and was unemployed; the mother had been fired from her job; the family had been evicted and was homeless; and the family was in a state of chaos. A permanency plan was adopted that required the parents to maintain stable housing; complete appropriate parenting classes and demonstrate parenting skills; maintain legal income; provide for the shelter and school attendance of the children; and obtain a mental health assessment of the children. Additionally, since the father had been convicted of a felony drug offense, he was to complete probation and drug rehabilitation, attend Narcotics Anonymous, and participate in random drug screens. Ryan and Steven were placed in foster care.

On May 14, 2007, DCS filed a petition in the Juvenile Court of Monroe County, Tennessee, to terminate the mother and father's parental rights to Ryan and Steven alleging persistence of the conditions that led to the removal of the children in 2004. The matter was heard on March 7 and 10, 2008.

Issues Presented

The parents present the following issues, slightly restated, for our review:

- (1) Whether the trial court erred in determining that clear and convincing evidence supported the termination of the parents' parental rights of Ryan based upon a persistence of conditions;
- (2) Whether the trial court erred in determining that DCS had demonstrated by clear and convincing evidence that termination of the parents' parental rights was in the best interest of Ryan;
- (3) Whether DCS failed to provide reasonable efforts as required by Tenn. Code Ann. § 37-1-166, thereby negating the parents' alleged failure to remedy persistent conditions.

DCS presents the following issue for review:

- (1) Whether the trial court erred in determining that termination was not in the best interest of Steven.

¹ The daughters were returned to the custody of the parents by a Consent Decree entered in March 2006 and were not parties to this proceeding.

Standard of Review

The findings of fact by a trial court sitting without a jury are reviewed by the court de novo upon the record with a presumption of correctness, and unless the evidence preponderates against the findings, we must affirm, absent an error of law. Tenn. R. Civil P. 13(d); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In the matter of L.J.C., A.L.C. and J.R.C.*, 124 S.W.3d 609 (Tenn. Ct. App. 2003). Further, we review issues of law de novo with no presumption of correctness. *Valentine*, 79 S.W.3d at 546 (citing *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993)).

Grounds for Termination

The law is well settled that “parents have a fundamental right to the care, custody and control of their children.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988)(citing *Stanley v. Illinois*, 405 U.S. 645, 92 Ct. 1208, 31 L. Ed. 2d 551 (1972)). This right, however, is not absolute and it may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1338, 71 L. Ed. 2d 599 (1982). “Clear and convincing evidence” is evidence which “eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence.” *O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

In the present case, the trial court terminated parental rights pursuant to the provisions of Tenn. Code Ann. § 36-1-113(g)(3)(A). This statute lists grounds for termination as follows:

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions that led to the child’s removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child’s safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child’s chances of early integration into a safe, stable and permanent home.

These grounds must be interpreted and applied in accordance with the express Legislative intent of our statutory system of child removal, foster care and adoption. One of the stated purposes of these statutes is “to protect [children] from needless prolonged placement in foster care and the uncertainty it provides, . . . if any early return to the care of the parents is not possible, they will be

placed in a permanent home at an early date.” Tenn. Code Ann § 37-2-401(a). Our courts have recognized the significance of permanency as the goal of decisions involving future placement of children and termination of parental rights. See, e.g., *State Dep’t. of Human Services v. Smith*, 785 S.W.2d 336, 338 (Tenn. 1990).

Analysis

Quoting from *In re L.M.W.*, No. M2008-00786-COA-R3-PT, 2008 Tenn. App LEXIS 512 (Tenn. Ct. App. Sept. 3, 2008):

Parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620,622 (Tenn. Ct. App. 1998). The petitioner has the burden of proving that there exists a statutory ground for termination, such as abandonment or failing to remedy persistent conditions that led to the removal of the child. Tenn. Code Ann. § 36-1-113(c)(1); *Jones*, 92 S.W.3d at 838. Only one ground need be proved, so long as that ground is proved by clear and convincing evidence. See *In re D.L.B.*, 118 S.W.3d 360,367 (Tenn. 2003). In addition to proving one of the grounds for termination, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467,475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child). Therefore, a court may terminate a person's parental rights if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is clearly and convincingly established that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793,810 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539,546 (Tenn. 2002). *L.M.W.*, 2008 Tenn. App LEXIS 512 at * 6-8.

The sole ground for termination in this case is persistence of conditions. Some conditions that existed which caused the children’s removal have been remedied: the parents now have stable housing and the mother is employed at Hardee’s. Most other conditions persist, including the mother and father’s continued inability to effectuate adequate parenting skills and the father’s drug use and employment problems. The father was unemployed at the time of the children’s removal in 2004. At the time of the termination hearing in March 2008, he was unemployed. His last employment was on an “as needed” basis with Wright’s Tree Service. Prior to that employment, he worked at BP until the employment was terminated due to his arrest for selling drugs. Despite completing his felony probation and a drug rehabilitation program, the father admitted he was using drugs recreationally in 2007. Rebecca Woods, a counselor for DCS, testified that the father failed several random drug screens. In 2006, the parents filed a petition for overnight visitation. However, on the day of the hearing on this petition, the father tested positive for drugs. After DCS filed the present

petition for termination, the father was arrested in September 2007 for selling drugs and received a three-year sentence for the offense, for which he was required to serve thirty days. He was scheduled to report to jail on March 10, 2008, after the conclusion of the hearing on this petition.

From the onset of DCS's intervention with this family in 2001, it was clear that the children had difficult, special needs requiring additional parental skills. Dr. Peter Young, a clinical psychologist, evaluated the children during a period from May 2007 through July 2007 and administered various tests to determine the children's mental functioning. Dr. Young testified that both children were functioning below normal expectation and were two to three years behind their ages. In his written report, Dr. Young wrote:

Steven qualifies as moderately retarded. . . . It should be clear that whatever improvements might be possible are not likely to bring Steven up to average range of functioning, but it could be imagined that with significant help, he might come to a place of vocational competence.

Dr. Young testified that Ryan's functioning was less severe. In his written report, Dr. Young noted that Ryan had been diagnosed with ADHD as well as other diagnoses and was on medication. Dr. Young recommended that the children's legal status be determined as expeditiously as possible. Dr. Young did not recommend that the children be returned to their parents. He further recommended that the children needed stability and structure. Dr. Young, in his report, noted with respect to Ryan:

The relationship with a supportive and insightful individual could be critical in helping him move toward an adequate adaption and eventually successful adulthood.

DCS initially provided parenting classes for the parents. However, these classes did not address the special parenting skills requisite for children with special needs. Therefore, DCS recommended family counseling with Carol Dunaway, a child therapist, with Child Help Family Agency. The sessions lasted from September 2004 through November 2007. The parents did not consistently attend and on one occasion, the father cursed Ms. Dunaway.

Ms. Dunaway observed the interaction between the parents and the children. The mother would dissociate or "space out" at intervals when the children needed her response. The parents would attempt to discipline the children, but would offer no consequence for their misbehavior. On one occasion, the father wrestled Ryan to the floor. Ms. Dunaway observed that "Steven was the wildest child she had seen in her life." The record reveals that Steven had inappropriate contact with a young girl and acted out sexually.

One of the conditions that led to removal was the parents' lack of parenting skills. Although DCS provided parenting classes and family counseling, the parents could not articulate any lessons they had learned in order to deal with the children. The mother's work schedule required that she be absent from home in the morning hours when the children would be preparing for school. Nevertheless, she felt that the father could provide these duties despite the fact that she knew the

father had issues with drugs. The children required medication daily. The father testified that the children would let him know when they needed their medication. The family had no support system either with other family members or friends. The mother testified that “[t]here ain’t nobody that’s ever going to help me be a better parent.” Based upon the forgoing, we find that the evidence does not preponderate against the trial court’s finding that there is clear and convincing evidence that persistent of conditions still exist that led to the removal of the children.

Reasonable Efforts

DCS must make “reasonable efforts” to make it “possible for a child to safely return to the child’s home.” Tenn. Cod Ann. §§ 37-1-166(a)(2)-166(g)(2). Whether DCS has made reasonable efforts to provide services to enable a child to return safely to the home must be determined on a case-by-case basis in light of the circumstances of the case. *In the Matter of C.M.C, C.L.C. and D.A.M.*, No. E2005-00328-R3-PT, 2005 Tenn. App. LEXIS 458, 2005-WL 1827855 at 9 (Tenn. Ct. App. Aug. 3, 2005, no perm. App. filed). When determining whether DCS has made reasonable efforts, the court may consider factors such as: (1) the reasons for separating the parent from his or her children, (2) the parent’s physical and mental abilities, (3) the resources available to the parent, (4) the parent’s effort to remedy the conditions that required the separation, (5) the resources available to the Department (6) the duration of the parent’s remedial efforts, and (7) the closeness of the fit between the conditions that led to the initial separation, the requirements of the permanency plan, and the Department’s efforts. *Id.* Certainly parents must also make reasonable efforts to substantially comply with the requirements of the permanency plan and rectify the conditions that led to the child’s removal. *Id.*

Ms. Rebecca Woods, the DCS Counselor, testified that every service available from DCS had been offered to the parents. The parents were given financial support and afforded more visitation than policy required. Ms. Woods further testified that the parents struggled to maintain control of the children during the four-hour visitation sessions.

The trial court found as follows:

Although the court recognizes that the Department is not required to make Herculean efforts to work with the parents, in this case the Department has made such efforts with respect to both parents. The court finds that the Department made tremendous efforts with the resources that are available.

Both Ms. Woods and Ms. Dunaway testified that services to the parents were ineffectual and that the parents were either unable or unwilling to benefit from the services. We find, therefore, that the evidence does not preponderate against the trial court’s finding of clear and convincing evidence that reasonable efforts were made by the Department.

Best Interest

Finally, in order to terminate parental rights, a trial court must find that it is in the child's best interest to do so. Tenn. Code Ann. § 36-1-113(c)(2). In determining whether termination of parental rights is in the child's best interest, the lower court must consider the following factors:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tennessee Code Annotated section 36-1-113(i). This list is not exhaustive and the statute does not require the court to find the existence of every factor before concluding that termination is in the child's best interest.

We agree with the trial court's finding that there is clear and convincing evidence that termination is in the best interest of Ryan. The parents have failed to pay child support. The father has recently been convicted of a felony drug offense and placed on probation. The father is unemployed and the mother's employment would require that the father be responsible for the daily care of the children. The parents are experiencing difficulties controlling the behavior of their two daughters, including truancy charges. The parents have failed to exhibit the proper parenting skills for special needs children. Ryan has been in foster care for several years and is in a stable, loving and structured environment. The foster mother is able to manage Ryan's daily behavior and has received special training to effectuate her efforts to provide for Ryan. The foster mother and her husband hope to adopt Ryan and provide the necessary love and support that he will need. Finally, the effect on Ryan of a change in his environment at this stage of his development is likely to have a substantial negative impact on the child given the parents' failure to acquire the necessary parenting skills.

The best interest of Steven differs from that of Ryan. Steven is the older and bigger of the two children. His impairment is more severe. He was placed with his foster mother in 2004 and Ryan followed in 2005. As Steven grew, he became more aggressive and destructive. He smashed a car windshield, fought with his brother and even hit the husband of his foster mother and began to act out sexually. The foster mother feared that Steven was becoming uncontrollable and was likely to hurt someone. As a result, Steven was placed in King's Daughters, a residential treatment facility specializing in children with Steven's needs. Since his placement with King's Daughters, Steven's condition has improved. He has participated in a Special Olympics and was rewarded with a medal for his efforts. He likes basketball and other sports. Additionally, he is receiving special education. Although the foster mother originally desired to adopt both children, she now feels her adoption of Steven is precluded because of his uncontrollable behavior. Dr. Young's report indicated that neither the foster home environment or the parental home appear appropriate to deal with Steven's needs. King's Daughters is providing a safe, structured and regimented environment that appears to meet the special needs of Steven. Accordingly, we find that the evidence does not preponderate the trial court's finding that it is not in the best interest of Steven to terminate parental rights.

CONCLUSION

We affirm the trial court in all respects. The costs on appeal shall be taxed equally between the parties, and their surety, if any, for which execution may issue. This case is remanded to the trial court for enforcement of the court's judgment and for the collection of costs assessed below, all pursuant to applicable law.

JON KERRY BLACKWOOD, SENIOR JUDGE